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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 48

ROSETTE SORGE SAVORGNAN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

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BRIEF FOR ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

Introduction

The Association of Immigration and Nationality Lawyers is a national association of lawyers admitted to practice before the Immigration Service and the Board of Immigration Appeals. Some of its members are former officials of the Immigration Service and the Board of Immigration Appeals.

The Association is interested in advancing the science of the administration of law pertaining to immigration, nationality and naturalization.

We submit this brief and ask leave of the Court to file it as *amicus curiae* because of our interest in the issues involved in the present case.

Statement

Petitioner, a native born American, resided in the United States until July 15, 1941, when she went to Italy with her husband, an Italian diplomat who was ordered to leave the United States. She had no intention of abandoning her United States domicile and she returned here in 1945.

Upon the assurance of her future husband that she would not lose her American citizenship and to obtain consent of the Italian government to the marriage, petitioner applied for and on August 25, 1940, was granted Italian citizenship. On November 23, 1940, she signed an Italian oath of allegiance in the Italian language which she could neither read nor understand. No oath was formally administered.

Argument

Point I

Petitioner was not expatriated under the 1907 Act

Under Section 2 of the Expatriation Act of March 2, 1907, 34 Stat. 1228 expatriation might result from (1) naturalization in a foreign state or (2) the taking of a foreign oath of allegiance.

1. Both expatriation provisions, however, required foreign residence. The basis for this requirement is set forth in an annotation prepared in 1938 by the Secretary of State, the Attorney General and the Secretary of Labor in their report proposing the Nationality Act of 1940. (House Immigration Committee Hearings on H.R. 6127 and H.R. 9980, 76th Congress, First Session, p. 492). There it was stated:

> "Ordinarily departure from the country of which a person has been a national is regarded as an essential element of expatriation (The Santissima Trinidad, 7

Wheat. 283; Talbot *v.* Jansen, 3 Dall. 133; Comitis *v.* Parkerson, 56 Fed. 556, Opinion of Attorney General Cushing, October 31, 1856, 8 Op. Atty. Gen. 139; Opinion of Attorney General Williams, August 20, 1873, 14 Op. Atty. Gen. 295). It is true that the Supreme Court of the United States held in the case of Mackenzie *v.* Hare (239 U. S. 299), that an American woman lost her American nationality under the provision of section 3 of the Act of March 2, 1907 (34 Stat. 1228), 'that any American woman who marries a foreigner shall take the nationality of her husband,' although she had remained in this country. However, this provision was repealed by the Cable Act of September 22, 1922, and as a general rule, it does not seem desirable that American nationals should be able to cast off their American nationality and allegiance while continuing to reside in this country. If such persons should perform acts in the United States which would result in their expatriation if they were beyond the territory and jurisdiction thereof, and if such acts are deemed reprehensible in themselves, the proper course would seem to be to provide adequate penalties, such as fine or imprisonment."

Thus it was the view of the Department of Justice (until it changed its position in the instant case) as well as that of the State Department that departure from the United States was a prerequisite to expatriation prior to the Nationality Act of 1940. That departure was a prerequisite under the 1907 Act is the view expressed by the Nationality Manual of the Immigration Service (1944) pp. 14068-70. This Manual is in the Department of Justice Library and contains the precedents of the Immigration Service which they are required to make public pursuant to 5 U.S.C. 1002(b).

Historically departure from the United States was essential to effectuate expatriation. The parent law of our expatriation statutes—the Virginia Law of 1779—drawn by

Thomas Jefferson required renunciation in open court and departure to effectuate expatriation. *House Document No. 326*, 59th Congress, 2nd Session (1906) p. 27.

Prior to 1907, departure from the United States with intent not to return was considered "the most certain evidence of intention of expatriation." The term "expatriation" was used synonymously with emigration. *House Document No. 326*, 59th Congress, 2nd Session (1906) at pp. 27, 164. See also: *Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens*, etc. Dept. of State (1925) at p. 1.

It was in the light of the foregoing concept, that expatriation connoted and required emigration or departure, that the 1907 statute was construed and administratively applied for many years. As noted above in the annotation to the Nationality Act of 1940 the Departments of State and Justice regarded *Mackenzie* v. *Hare* 239 U. S. 299 as an exception to the general rule. We believe that careful analysis of *Mackenzie* v. *Hare* will reveal that this Court merely held that a married woman's citizenship was held in suspension, only during marriage to an alien. This was based on the unity theory of husband and wife. We think that the expatriation which resulted in that case was in fact involuntary and we submit that the theory of that case is inapplicable herein and should not be followed today.

The 1907 Expatriation statute should be strictly construed. *In Matter of Yamamoto*, U. S. District Court (Hawaii), No. 214, 1929, Judge Massee stated with regard to this statute:

> "The statute, section 2, *supra*, being penal in its nature, the act which, in law is deemed to take away the citizenship of birth, must strictly conform to the statute. Citizenship by birth is presumed to continue until expatriation is clearly established. *Hauenstein* v. *Lynham*, 100 U. S. 483."

A strict construction of the statute, viewed in the light of the historical development of expatriation in the United States and considered with due weight given to a consistent administrative interpretation of more than thirty years should result in an interpretation requiring departure from the United States before expatriation can become effective. Since petitioner did not depart from the United States during the period that the 1907 Act was in force, she was not expatriated under its provisions.

2. The petitioner applied for Italian citizenship under the misleading advice of her husband and without intention of abandoning her American citizenship. Expatriation is founded on the doctrine that the individual voluntarily intends to abandon citizenship. *Perkins* v. *Elg*, 307 U. S. 325; *Tsiang*, The Question of Expatriation in America Prior to 1907 (1942). A liberal doctrine of mistake should therefore be applicable herein. Exacting proof of intention to abandon citizenship should be required if expatriation is to be a concept of voluntary action as the word implies. If petitioner did not exercise a free and intelligent choice based upon a correct understanding of the nature of her conduct, expatriation should not follow. Thus in holding that voting in Japan did not result in expatriation Judge Cavanaugh stated in *Arikawa* v. *Acheson*, 83 F. Supp. 473 (1949):

> "The fundamental principle of law is applicable as to influence, mistake and confusion existing which dominated the mind in not acting freely and voluntarily at the time."

We submit that petitioner did not intend to expatriate herself and that the confusion under which she labored precludes a finding of voluntary abandonment of citizenship—the essence of the doctrine of expatriation.

3. Petitioner was not expatriated by signing an oath of

allegiance to Italy. Under the 1907 expatriation statute it was necessary that an oath of allegiance be taken to a foreign power. The 1940 statute permitted expatriation by the "taking of an oath, an affirmation or *other formal declaration* of allegiance to a foreign state." The annotations to 401(b) of the Nationality Act of 1940 (Hearings on H.R. 6127, 9980 *supra* at p. 490) indicate that the oath required by the 1907 Act was not sufficiently broad enough as some states do not recognize an "oath" which usually has a religious connotation. In *Matter of Yamamoto, supra*, it was held that a pledge of allegiance was insufficient under the 1907 statute. Thus, it will be observed that formal conduct was contemplated under that statute to effectuate expatriation.

To sustain a conviction for perjury it is necessary to establish that a formal oath has been administered. *O'Reilly* v. *People*, 86 N.Y. 154. Before the precious rights of citizenship are taken away, it should likewise be established by clear proof that the required formalities have been followed. In the instant case no formal oath was administered and therefore it is not established that petitioner engaged in the formal acts necessary for expatriation.

Point II

The Nationality Act of 1940 is Inapplicable

Petitioner's conduct in applying for Italian citizenship and signing an oath of allegiance occurred prior to the effective date of the Nationality Act of 1940. Nevertheless, the government argues that this Act, 8 U.S.C. 801, has retroactive application. (Government Brief, p. 60).

It is submitted that the Nationality Act of 1940 is prospective in operation. *Shaufus* v. *Attorney General*, 45 F. Supp. 61 (1942); *In re Skoglund*, 46 F. Supp. 434 (1942).

"Were the expatriation sections retroactive, they could not interfere with or disturb the vested rights of citizenship and at the same time be valid under our constitution." *Matter of Alvarado* (Decision of Board of Immigration Appeals, File No. 56158/416, approved by the Attorney General, June 6, 1945).

Section 347 of the Nationality Act of 1940 (8 U.S.C.A. 747) did not preserve the 1907 Act. It has been held that Section 317 did not preserve a mere condition to enable an individual to tack on residence in the United States subsequent to the 1940 Nationality Act in order to complete citizenship. *U. S. ex rel. Aberasturi* v. *Cain*, 147 F. (2d) 449. The position taken in the instant case by the government is directly contrary to the position it is now taking in the Court of Appeals for the District of Columbia in *Bertoldi* v. *Clark* #10224, where it is urging approval of the *Aberasturi* case. In the acquisition of citizenship a liberal construction of the statute is permissible. Certainly, where a strict construction of a statute is required as in the case of an expatriation statute, residence after the 1940 Act can not be tacked on to complete loss of citizenship.

Conclusion

The court has urged the most elaborate safeguards for the protection of citizens in denaturalization proceedings where citizenship is allegedly acquired illegally or fraudulently. See *Baumgartner* v. *United States*, 322 U. S. 665; *Schneiderman* v. *United States*, 320 U. S. 118. Greater safeguards should surround expatriation where there is no taint of illegality of fraud, for expatriation likewise takes away the precious rights of citizenship, a right "no less precious than life, or liberty, indeed one which today comprehends those rights and almost all others." *Klapprott* v. *United States*, 335 U. S. 601, 616.

Before taking away such rights the most exacting proof should be offered that there has been compliance with the applicable statute. The burden is upon the government. It is submitted that in the instant case the government has not established that the petitioner fulfilled the conditions required for expatriation.

Respectfully submitted,

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